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No. 92-1803

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Petitioner,

v.

MCDONNELL DOUGLAS CORPORATION,
Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California In and for the Second Appellate District, Division One

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do goods lose their protection as protected exports under the Import-Export Clause of the United States Constitution (art.-I, § 10, cl. 2), and thereby become subject to a State's sales tax, if the buyer detains the goods at the international border in the State for less than 48 hours to transfer the goods from U.S. to Mexican common carriers solely to accommodate U.S. and Mexican transportation laws?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent McDonnell Douglas Corporation ("MDC")[1] respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment and opinion of the California Court of Appeal, Second Appellate District, after the California Supreme Court denied review on February 11, 1993.

STATEMENT OF CASE[2]

Aeromexico, the Mexican national airline, operated from Mexico City an international fleet of aircraft manufactured by MDC. (App. to Pet. for Cert. at B5, B6.)

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[1] Pursuant to Rule 29.1, MDC discloses Finnish American International Trade, Inc. as its only corporate parent, subsidiary (other than wholly-owned subsidiaries) or affiliate.

[2] Pursuant to Rule 15 of this Court, Respondent states that it does not agree with the Petitioner's abbreviated Statement of Case.

Aeromexico purchased aircraft parts from MDC to maintain and service its fleet only at Mexico City. From Mexico City, Aeromexico placed orders with MDC for the parts, showing Mexico City as the destination, and stating that the parts were "FOR EXPORT TO MEXICO." (App. to Pet. for Cert. at B6.)

MDC delivered all the parts F.O.B. Long Beach, California, to United States common carrier trucks. Title passed to Aeromexico upon delivery to the common carriers. MDC and Aeromexico used surface trucks because Aeromexico's DC-9 aircraft were too small to handle the parts. (*Id.*)

Due to prohibitions of U.S. and Mexican laws, exporters using surface transport typically transfer goods from U.S. common carriers to Mexican carriers on the U.S. side of the border. This transfer occurs at "freight forwarders." (*Id.*)

Aeromexico used AM MEX International as its freight forwarder at the international border, San Ysidro, California, to make the truck transfers to Mexican trucks. Aeromexico used AM MEX's expertise in U.S. and Mexican customs regulations and fees. Aeromexico depended on AM MEX's relationship with both countries' custom officials. Aeromexico stationed employees at San Ysidro to oversee the transfers. No person, neither freight forwarder nor Aeromexico employee, inspected, repackaged, or opened the packaged parts while at San Ysidro. The parts spent less than 48 hours at San Ysidro during the transfer operation. All parts had been previously packaged and conditioned for export. Without exception, every one of 8,000 shipments went to Mexico City. (App. to Pet. for Cert. at B6, B7, B18, B19.)

Aeromexico had no use for the parts at San Ysidro. (App. to Pet. for Cert. B19.) There was no likelihood that the parts would be diverted. They were not diverted. Aeromexico could not install the parts in California. Aeromexico had no maintenance or landing facilities at San Ysidro. (App. to Pet. for Cert. at B6, B19.)

On July 3, 1985, the Petitioner assessed a $639,889 deficiency of sales and use tax and interest on the delivery of parts by MDC to Aeromexico. (App. to Pet. for Cert. at B7.) MDC brought an action to recover taxes. A California trial court rendered judgment against MDC on July 29, 1991. (App. A to Pet. for Cert.) A California Court of Appeal reversed, ordering judgment for MDC. (App. to Pet. for Cert. at B20.) On February 11, 1993, the California Supreme Court denied without comment the Petitioner's petition for review.

ARGUMENT

There is neither an important question of federal law nor any conflict with prior decisions of this Court. Without comment, the California Supreme Court denied review of the Petitioner's State petition for review, undoubtedly because this Court's prior decisions articulate adequate guidance to state taxing authorities.

I. NO IMPORTANT QUESTION OF FEDERAL LAW EXISTS

As the California Court of Appeal stated, "there was no conflict in the evidence [and] the decisive facts are undisputed." (App. to Pet. for Cert. at B10.) The parties also agreed as to the rule of law. (App. to Pet. for Cert. at B12.) The California Court of Appeal was left only to weigh and sift complicated but uncontroverted facts and apply the uncontroverted law to the facts. "Applying these principles to the facts before us, we conclude that MDC's Aeromexico parts sales were tax-exempt exports." (App. to Pet. for Cert. at B18.) The California Court of Appeal looked at the contents of documents indicating an intention to export, and examined the manner Aeromexico took title, the reasons for using freight forwarders, the purpose for the border delay, the likelihood of diversion, Aeromexico's lack of alternative uses at the border, and other facts. (App. to Pet. for Cert. at B18-19.)

Regarding the rule of law, the parties "correctly agree" that

> "goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

(App. to Pet. for Cert. at B12, citing *Coe v. Town of Errol,* 116 U.S. 517, 527 (1886) (Commerce Clause decision [3]).)

> "Under that test, it is not enough that there is an intent to export, or a plan which contemplates exportation or an integrated series of events which will end with it. . . . The tax immunity runs to the process of exportation and the transactions and documents embraced in it. . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use."

(App. to Pet. for Cert. at B13, citing *Empresa Siderurgica, S.A. v. County of Merced,* 337 U.S. 154, 157 (1949).)

The law is neither unsettled nor in conflict. The Petitioner lost nearly identical issues of fact and law before this Court in *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946), which invalidated a California sales tax upon oil briefly detained at the California border. The Petitioner now hopes to reargue its loss almost fifty years later. There is no reason to overrule *Richfield,* and this Court previously has stated that "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). Where, as here, the facts and law are not

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[3] "[T]he meaning of 'export' is the same under" the Commerce Clause and the Import-Export Clause. *Empresa Siderurgica, S.A. v. County of Merced,* 227 U.S. 154, 156 n.2 (1949). The Commerce Clause is article I, section 9, clause 5 of the United States Constitution: "No tax or duty shall be laid on articles exported from any State."

in dispute, no federal interest would compel this Court to apply complicated facts to determine a result different from the California Court of Appeal's decision.

II. THE CALIFORNIA INTERMEDIATE COURT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRIOR DECISIONS

The Petitioner would have this Court believe that a taxpayer automatically loses constitutional protection against levies on exports if goods are interrupted or detained within the State where the export begins its physical movement: "No cited case holds that a solely intrastate movement of goods provides constitutional immunity from taxation." (Pet. for Cert. at 9.) The Petitioner, however, does not account for this Court's Import-Export Clause decisions examining brief intrastate interruptions.

Regarding goods which have physically moved inside a State along their foreign journey, several decisions have held levies to be unconstitutional despite a brief interruption in the journey within the State of export. As mentioned previously, this Court has invalidated California's application of a sales tax to exports detained at the international border. In *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946), this Court held unconstitutional California's attempt to levy upon oil the taxpayer sold to the New Zealand government. The taxpayer pumped the oil first to harbor storage tanks, where it was delivered F.O.B. Los Angeles to a New Zealand naval vessel harbored within California waters. *Id.* at 71, 83. This Court held that the test for application of constitutional protection is "whether the 'export had begun' " at the time the tax accrued. *Id.* at 81. Notwithstanding the interruption at the California border, this Court looked at the "certainty that the process of exporation has started," *id.* at 82-83, and determined that the fact the goods "have been delivered to a common carrier" for the purpose of export is "best" evidence of export. *Id.* Even though the purchaser took delivery of the oil in California, "there was nothing equiv-

ocal in the transaction which created even a probability that the oil would be diverted to domestic use." *Id.* at 83.

In *A.G. Spalding & Bros. v. Edwards,* 262 U.S. 66 (1923), a domestic corporation delivered baseball bats to a New York exporter, which transferred them to an off-shore carrier. The exporter processed the receipt and bill of lading and gave directions for packaging. The Internal Revenue Service imposed a war revenue tax on Spalding, arguing that the transfer from Spalding to the exporter gave rise to a taxable sale. This Court held the tax unconstitutional, declaring that the test was whether "the export [of the goods] must be said to begin." *Id.* at 69.

The taxing authority in *Spalding* argued that interruption in New York could have permitted the exporter to divert the goods. This Court rejected the argument of the prospect of diversion:

> "There was not the slightest probability of any such change and it did not occur. The purchase by [the exporter] was solely for the purpose of the [foreign purchaser] and for their account and risk. *Theoretical possibilities may be left out of account.* . . . The overt act of delivering the goods to the carrier marks the point of distinction. . . ."

Id. at 70 (emphasis added).

In *Carson Petroleum Co. v. Vial,* 279 U.S. 95 (1929) (a review of both the Import-Export Clause and the Commerce Clause), this Court held unconstitutional a tax upon oil detained in tanks awaiting off-loading to ocean-going tankers bound for foreign ports. The Court noted as evidence of the export the lack of any local market for the oil at the jumping-off point. *Id.* at 109.

Similarly, Aeromexico took delivery in California by a common carrier committed to the export process; there was *Richfield's* "certainty" about the exports. Every single shipment crossed the border and arrived in Mexico City.

The parts were neither stored nor processed in San Ysidro. The San Ysidro delay was incident to export, and to nothing else. The parts served no purpose for Aeromexico in San Ysidro; they were there only to be transferred from truck to truck in the course of their trip to Mexico City. There was no prospect for diversion. The parts had started their journey at the edge of MDC's plant in Long Beach, and nothing diverted or intercepted them.[4]

The Petitioner's cited authorities, which uphold levies, merely apply the uncontroverted rule of law to facts different than MDC's. The Petitioner's cited cases involve lengthy delays at the border or delays for purposes other than export. *See Kosydar v. National Cash Register Co.*, 417 U.S. 62, 63-64, 69 (1974) ("machines relevant to this case were in storage in the Dayton warehouse, awaiting shipment;" "[t]itle and possession were in [the taxpayer];" "there simply had been no movement of the goods—no shipment, and no commencement of the process of exportation"); *Empresa Siderugica, S.A. v. County of Merced,* 337 U.S. 154, 157 (1949) (cement plant awaiting disassembly for foreign transport; "[o]n the tax date the movement to foreign shores had neither started nor been committed"); *Joy Oil Co. v. State Tax Commission of Michigan,* 337 U.S. 286, 289 (1949) ("fifteen-month delay at Dearborn barred immunity of petitioner's gasoline"); *Coe v. Town of Errol,* 116 U.S. 517 (1886) (logs at border awaited identification of buyer; shipment was indefinite); *Brown v. Houston,* 114 U.S. 622, 629, 632-33 (1885) ("The complainants were not

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[4] The Petitioner makes a secondary argument that unless a "legal obligation" exists to compel export, the goods have not entered the export stream. The Petitioner ignores the invoices and a purchase agreement which obligated MDC to export the parts to Mexico. No reported decision makes "legal obligation" the *sine qua non* of "certainty". Similar arguments were rejected in *Spalding,* 262 U.S., at 70, and *Richfield,* 329 U.S., at 80-83 (extensive analysis of the "certainty" requirement).

exporters; they did not hold the coal at New Orleans for exportation, but for sale there.").

The California Court of Appeal correctly analyzed the facts of this Court's prior decisions, and held the goods protected from levy:

> "The goods were delivered into the export stream and never diverted or delayed, other than for the border transfer without which they could not have completed their journey. . . . As in . . . *Richfield*, and *Spalding*, and unlike in *Empresa* and *Coe*, Aeromexico's clear plan to ship the parts to Mexico City for its own use was acted upon and continued uninterrupted to completion other than for unavoidable delays incidental to their journey."

(App. to Pet. for Cert. at B18-19.)[5]

The Petitioner's citation of *Itel Containers International Corp. v. Huddleston*, 113 S. Ct. 1095 (1993), is inapposite as a matter of law. *Itel* upheld a "taxation fall[ing] upon a service distinct from . . . goods and their value." *Id.* at 1106. As *Itel* stated: "[T]he tax here is not a tax on importation or imported goods, but a tax on a business transaction occurring within the taxing State. . . . [I]t is not levied on the containers themselves or on the goods being imported in those containers." *Id.* As the California Court of Appeal observed below, citing *Itel*'s progenitors, *Department of Revenue of Washington v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 758 (1978) (the Court "permitted taxation of in-

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[5] There is no conflict in the Circuits or in the States. *See Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816, 821 (5th Cir.), *cert. denied*, 498 U.S. 897 (1990) (exempt: jet fuel pumped to foreign tanker in State waters); *Connell Rice & Sugar Co. v. County of Yolo*, 569 F.2d 514, 518 (9th Cir. 1978) (not exempt: rice stored and accumulated for inspection at harbor elevators); and *Gough Industries, Inc. v. State Bd. of Equalization*, 51 Cal. 2d 746, 749, *cert. denied*, 359 U.S. 1011 (1959) (exempt: electrical parts detained at a freight packer awaiting transfer).

come from services connected to both imports and exports"), and *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 302, *reh. denied,* 424 U.S. 935 (1976) ("Petitioner's tires . . . were no longer in transit. They were stored in a distribution warehouse from which petitioner conducted a wholesale operation. . . ."), the "export exemption still applies to goods in the 'export stream.'" (App. to Pet. for Cert. at B13, n.4.) No component of services existed in MDC's sales of aircraft parts to Aeromexico.

CONCLUSION

The mere fact that the Aeromexico parts were delayed for less than 48 hours at San Ysidro, California for the sole purpose of transport to Mexican trucks does not defeat constitutional protection. The facts, and the decision of the California intermediate court, are consistent with prior decisions of this Court. There is no reason to grant the Petition. Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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